No. 14955

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD RAYMOND EGE, JOSEPH BOYD and JOSEPH VICTOR BRUNO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

Answering Brief for Appellant, Joseph Victor Bruno.

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For the purpose of this reply brief, we shall confine ourselves to the answering of those statements and arguments of Government counsel which have a bearing on the appeal of Joseph Bruno, leaving to other counsel to answer for their respective clients. The fact that arguments or points set forth in the opening brief in behalf of Bruno are not repeated or referred to herein should not be taken as an indication that they, or any of them, are abandoned.

It is our belief that the appeal of Bruno should be separately considered from that of his alleged co-conspirators, and that the evidence, and the inferences to be drawn therefrom, as they affect Bruno are readily severable. We also believe that the situation in which Bruno finds himself is unique, in that at least so far as direct evidence is concerned, he never knew, saw, or communi-

cated with his alleged co-conspirators during the period of the alleged conspiracy. There is no evidence that the names or even the identity or existence of his alleged co-conspirators were ever communicated to Bruno or mentioned in his presence. We are aware of a number of reported cases wherein convictions have been upheld in which a multiplicity of conspirators were involved and each conspirator did not know or have contact with *all* of the remainder. However, we have not uncovered a case where one alleged conspirator was not shown to have known or had direct contact with *any* of his alleged co-conspirators.

(A) The Evidence.

We wish to take sharp issue with the Government's statement of the evidence, and of the inferences to be drawn therefrom. We have carefully re-read the entire record, compared it with our opening brief, and will stand upon our statements summarizing the evidence (Bruno Op. Br. 9-16) and referred to throughout the opening brief. Although the temptation exists to compare counsel's statements one by one with the record, this would serve no useful purpose in view of our knowledge that this Honorable Court invariably examines the entire record on appeal with care. We realize, of course, that legitimate argument permits counsel on either side to draw inferences from the record to support his side, but feel that when a statement is attributed to the record, then it should be carefully worded to speak with reasonable exactness what the record actually contains. With this thought in mind, we shall only comment on Government's statements purporting to recite evidence as such statements may be involved in the argument herein.

However, it should be pointed out that counsel for the Government has leveled the serious charge that the undersigned has "neglected to read the record carefully" (Gov.

Br. 36) and is guilty of a "complete distortion" of the record (Gov. Br. 40). Possibly the validity of this challenge can be tested by examining it in its context. For example, the Government states:

> ". . . It may be suggested that counsel neglected to read the record carefully. Mr. Giomi whose market was at 2545 Noriega Street testified that he was introduced to Mr. Ege by Mr. Boyd and that Mr. Ege took over the obligation of Mr. Boyd on the house at Monterey Boulevard which was used as a rendezvous for prostitutes [Tr. 196]" (Gov. Br. 36).

A careful reading of page 196 of the Transcript of Record, and, indeed, of the entire testimony of Giomi does not disclose that he testified that the house on Monterey Boulevard was used by prostitutes as a rendezvous, or otherwise, or for any illegal purpose of any kind. The incongruity of counsel's accusation would be amusing, were it not that a man's liberty is at stake.

(B) The Sufficiency of the Evidence.

So far at least as Bruno is concerned, and in the absence of any direct evidence, the Government's argument as reiterated throughout its brief seems to be as follows:

(1) Prostitution employment is of a transient nature (Gov. Br. 32);

(2) The victim in this case was a prostitute traveling on a prostitution circuit (Gov. Br. 15);

(3) A brothel owner knows that a prostitute employed by him must necessarily have worked at brothels before and would be employed at other brothels in the future (Gov. Br. 13);

(4) An experienced brothel owner would know that a prostitute would be shipped from place to place in accord-

ance with the demand in various localities for prostitutes (Gov. Br. 32);

(5) A brothel owner cannot close his eyes to the possibility that the prostitutes might come from out of state (Gov. Br. 33);

(6) If, in fact, the prostitute travels in interstate commerce, the brothel owner, by providing employment, has become a party to her transportation, along with other brothel owners who may have employed her (Gov. Br. 42-43).

The foregoing, although not in the exact language used, is the gist of the Government's argument, and appear to be the basic premises upon which they would make Bruno a co-conspirator with Ege and Boyd, with whom, according to the evidence against him, he had never had any contacts.

This concept flouts the basic principles of what constitutes a conspiracy: the agreement, *i. e.* the meeting of the minds in an understanding way to accomplish the common purpose. It is directly opposed to the decision of this Honorable Court in the case of *Lee v. United States* (C. A. 9), 106 F. 2d 906, referred to in this appellant's opening brief, and attempted to be distinguished by the Government (Gov. Br. 30-31).

In the *Lee* case, the "victim", who was a practicing prostitute in Portland, Oregon, was transported in interstate commerce to Seattle, Washington, by one Green and Purvis, where she went to work as a prostitute in the brothel of Green. The appellant met her at this house, and she moved in with him on August 15, giving him the money which she made. In the latter part of September, appellant took her to Portland, Oregon for immoral purposes. Appellant and five others were convicted of conspiracy to violate the White Slave Traffic Act. One of the overt acts alleged was that appellant transported the "victim" from Seattle to Portland. This Court re-

versed the conviction on the grounds that "there is no evidence to show that when he committed the overt acts he had knowledge of such a conspiracy."

If the Government's argument in the instant case be accepted, then the finding in the *Lee* case must be rejected for, under the same reasoning, Lee, being experienced in the prostitution trade as one accepting the earnings of a prostitute, whom he knew to be such, was familiar with her traveling from place to place, including in interstate commerce, and therefore was a co-conspirator with the brothel owners in Seattle as to her past and future interstate transportations.

The fact that Lee took the stand and denied knowledge of her transportation from Portland to Seattle does not distinguish the cases. In this case, there is nothing in the record (which is not nearly so strong as that in the *Lee* case, since Lee picked up the girl at the Seattle house, and actually transported her to another state) from which it might be inferred that Bruno had specific or any knowledge of Bell's interstate transportation to Arizona, nor her travel from Arizona immediately preceding his meeting her.

Government counsel attempts to overcome this situation by a rather specious argument. He states:

> "Here the circumstances were such that it was extremely unlikely that Bruno was under any misapprehension as to Bell's place of origin. In any event, however, Bruno did not raise this issue at the trial. If Ege or Bell told him that she traveled only in California appellant Bruno did not choose to place this evidence in the record. The jury did not require to make an inference not supplied to it by the evidence. The fact was that Bell came from Arizona. There is no evidence that Bell or Ege made any concealment of that fact. The jury, therefore, was not required to find that they did so" (Gov. Br. 31).

In the first place, Bruno certainly did raise this issue at the trial. His plea of "not guilty" put in issue every material element required to support the indictment. This matter remained at issue throughout the trial. This rule is so fundamental to our system of jurisprudence as to not require the citation of authority. And, too, a standard which only prescribes circumstances making lack of essential knowledge "unlikely" is violative of the doctrines of reasonable doubt and the burden of proof.

In the second place, neither Ege nor Bell claimed to have told Bruno anything about Bell's travels. Bell, who testified fully about her contacts with Bruno, either failed or avoided mentioning to him that she had come from Arizona, or anything else about her previous experiences or contacts. Since she was the complaining witness, and was produced by the Government, we are entitled to believe that she testified on all relevant matters in her knowledge. Ege denied ever knowing, seeing, or talking to Bruno [R. 288-289, 308]. Thus, there was no evidence of either revelation or concealment by Ege or Bell of Bell's trip to or from Arizona, *since the matter was never discussed with Bruno.* Hence, the jury was not only not required to make a finding that Bell or Ege made a concealment of the fact that Bell came from Arizona, but *they could not justifiably make a finding that such fact was in the knowledge of Bruno.* And without such finding, their verdict cannot stand. Nothing would have been added had Bruno taken the stand and confirmed the evidence of Bell and Ege in this respect.

To meet this obvious collapse of its case against Bruno, the Government seeks to rely upon the alleged telephone call from Ege to Bell as raising an inference of a previous agreement between Ege and Bruno of a nature which would inform Bruno of the existence of a conspiracy involving Ege and others (presumably Boyd), and Bruno then joining and becoming a part of the pre-existing conspiracy (Gov. Br. 34-35).

In the first place, the alleged conversation between Ege and Bell was outside the presence of Bruno, and cannot be used to establish his connection with the conspiracy. See cases heretofore cited (Bruno Op. Br. 22-23), including *Glasser v. United States,* 315 U. S. 60, 62 Sup. Ct. 457, and the very exhaustive collection of authorities by a three judge Court in *United States v. United States Gypsum Co.* (D. C. D. C.), 67 Fed. Supp. 397.

Secondly, even if the conversation of Ege and Bell be considered, what is there in it of an incriminating nature so far as the instant indictment is involved? Ege's statement to Bell was simply that Delano was opening up, and that she should fly there because there was a shortage of girls; that she was to purchase her ticket from the money which she had made at Scottsdale; that when she arrived in Los Angeles she was to call a certain number in Delano, which was that of Joe Bruno and advise of when her plane would arrive at Bakersfield [R. 76-78]. The inference is clear that Ege did not want the person answering the telephone in Delano to know that Bell had started her trip in Arizona, or why the precaution of warning her to phone from Los Angeles as to her time of arrival at Bakersfield? Since she purchased her own transportation, she would know the time of arrival at Bakersfield before leaving Arizona. As pointed out in our opening brief, the nature of the phone call and the place of its reception clearly infer that Boyd was not to be consulted or advised concerning it.

Thus, assuming for the sake of argument only that the telephone conversation of Ege and Bell can be considered against Bruno, we come to another basic proposition: the nature of Bell's trip from Arizona. In persuading and inducing Bell to travel from Arizona to California for the purpose of indulging in prostitution, if true, Ege committed the offense denounced by Section 2422, Title 18, United States Code, and not Section

2421 thereof, to which the instant indictment is limited. The distinctions between the two sections are clearly delimited by the cases cited in our opening brief (Bruno Br. 24-26); and particularly in *LaPage v. United States* (C. A. 8), 146 F. 2d 536. Counsel for the Government (Gov. Br. 56) cites the case of *Schrader v. United States* (C. A. 8), 94 F. 2d 926, as being to the contrary. However, in the *LaPage* case, *supra,* the same Court discusses and distinguishes the *Schrader* case and indicates that if the same point had been raised in the earlier case a different result would have ensued. Government counsel also refers to *Wagner v. United States* (C. A. 5), 171 F. 2d 354. In *Wagner,* the Court of Appeals approves the holding of the *LaPage* case, *supra,* but points out that under certain circumstances (not relevant here) a defendant can violate both sections with regard to a single act of transportation.

Again, assuming for the sake of argument, that a prior communication had been had between Ege and Bruno, it certainly cannot be inferred that such communication would go beyond the events which actually occurred: to wit, that Constance Marie Bell would telephone Bruno from Los Angeles and would fly into Bakersfield where she could be met and taken to the house of prostitution at Delano. While the Government would like to infer that Ege had given at least an inculpatory description of what had transpired among himself, Boyd and Bell prior to that time, such a disclosure was not only highly improbable but would have served no purpose whatsoever. Not being a reasonably necessary incident to any prearrangement, it cannot be inferred.

Such acts as Bruno was shown to have performed did not require any knowledge of a conspiracy, and hence such knowledge cannot be inferred from those acts. Even the acts and statements of his alleged co-conspirators do not indicate any knowledge by Bruno of a conspiracy

to transport women in interstate commerce for immoral purposes. As stated in *Lee v. United States, supra*:

> ". . . While one 'who commits an overt act with knowledge of the conspiracy is guilty', he 'must know the purpose of the conspiracy, however, otherwise he is not guilty.' Marino v. United States, 9 Cir., 91 F. 2d 691, 696, 113 A. L. R. 975, certiorari denied, 302 U. S. 764, 58 S. Ct. 410, 82 L. Ed. 593. See also Craig v. United States, 9 Cir., 81 F. 2d 816, 822, certiorari denied 298 U. S. 690, 56 S. Ct. 959, 80 L. Ed. 1408."

(C) Jurisdiction of the Trial Court.

In his opening brief Bruno contended that the Trial Court was without jurisdiction to enter judgment or impose sentence upon him for the reason that none of the overt acts alleged in the indictment were shown to have taken place in the Northern District of California, the venue of the indictment (Bruno Br. 28-39). In answer to this, the Government contends that Overt Acts 1, 2, 3, 4, 5, 8 and 10 were proven as taking place in the Northern District of California (Gov. Br. 35-43):

Certain elements are essential for an alleged overt act to have probative value. They are:

(1) It must be proved:

(2) It must have occurred during the existence, that is, after the formation, of the alleged conspiracy;

(3) It must have been of a nature and intended to effect the objects of the conspiracy;

(4) If it involves the jurisdictional element, then it must be proved to have taken place within the venue of the trial court.

In determining whether or not any given alleged overt act meets these requirements, it should first be determined when, under the evidence, a conspiracy among any two

of the defendants occurred. In the absence of direct proof, we must look to circumstantial evidence for the answer to this question. For the purpose of the argument on this point we shall refer to all the evidence in the case, leaving aside the questions of admissibility.

It should be borne in mind that the conspiracy claimed by the Government in the instant case involved but one woman: Constance Marie Bell. All of the proof revolved about her and her activities. A conspiracy to transport her in interstate commerce for the purpose of prostitution could hardly have been formed prior to her advent on the scene. According to her testimony she first met Ege in August or September, and neither Boyd nor Bruno until at least October, 1953. After conversation with Ege, she decided to become a prostitute, and worked for awhile at his establishment at Folsom, California. After returning from there, efforts were apparently made to obtain work as a prostitute in and around San Francisco, without results, but finally Ege or Bell found the job in Phoenix (Scottsdale), Arizona [R. 70-71]. This last is the first circumstance which would indicate a plan or scheme on the part of anyone to send or transport Bell in interstate commerce. It is the first time that there could have possibly been, under the evidence, a "meeting of the minds in an understanding way" to accomplish the purpose of the alleged conspiracy.

In support of this, the following facts in evidence become pertinent: (1) Boyd arrived in Phoenix about September 20, 1953 [R. 204] allegedly for the purpose of setting up gambling games [R. 234]; during the first week of October, he visited Scottsdale, Arizona, and inquired about houses to rent [R. 210]; on October 6, 1953, he leased the house of Ellingson at Scottsdale, and was privileged to occupy it the next day [R. 202-203]; Boyd contacted Judy Berg and talked to her about working at Scottsdale [R. 244]; in San Francisco, Berg informed Ege and Bell that she (Berg) was going to

Phoenix to work and had the address (presumably Boyd's) [R. 272-273]; Ege told Bell she could go down to Phoenix with Berg, and provided Bell with funds to share expenses on the trip [R. 71-72]; Ege and Boyd talked by telephone [R. 244]. Boyd stated he had two girls coming from California [R. 212]. In stating the foregoing, we have confined ourselves to the Government's witnesses, and ignored the flat denials of Ege.

The above constitute the first circumstances under which an inference of the meeting of the minds of anyone, or the consummating of acts looking to a joint result, could possibly arise. Of necessity, and in fact, they occurred at a time subsequent to the events attempted to be described in Overt Acts 1, 2, 3 and 4. Thus, even if proved, Overt Acts 1, 2, 3 and 4 fail to measure up to two requirements: (1) occurring during the existence of the alleged conspiracy, and (2) of a nature and intending to effect the objects of the conspiracy.

(1) Overt Act 1.

In stating that no evidence was offered as to Overt Act 1, counsel for Bruno relied on the record as it existed at the time the Government rested its case, and Bruno rested his case [R. 281-283, 332], under the belief that Bruno is neither bound by nor can accept the benefits of subsequently received evidence in the case of an alleged co-conspirator (Bruno Br. 52). The Government in its brief has taken the contrary position, for which reason we have heretofore in this reply brief referred to Ege's testimony that he had never seen, nor talked to Bruno. However, we are still of the opinion as expressed in our opening brief. To hold otherwise would deprive a defendant of his right to rely upon a believed insufficiency of the Government's proof to establish a case against him.

Be that as it may, the quoted portion of Ege's testimony (Gov. Br. 36) is not of material assistance to the

Government, as Ege obviously did not know if they had been to the Noriega address or to one of the other stores operated by Giomi. Giomi testified that at the time in question he operated a market at 1630 Ocean Avenue [R. 197-198].

The indictment alleged an event which occurred in June, 1953. The bill of particulars placed it as "on or about June 15." The event described was simply that Boyd and Ege went to a certain address on that date.

The Government now contends that this overt act refers to an occasion in May, when Ege took over Boyd's lease on the premises at 395 Monterey Boulevard. But there is nothing in the indictment or bill of particulars to identify that to be the occasion.

We agree that the general rule is that the exact date on which a crime is committed is not a requirement, and that proof of another day is admissible. But such rule applies to identifiable events.

The Government was not taken by surprise here. Giomi produced and utilized a memorandum of his records, and the day of the taking over of the lease was an exact one.

If this were an isolated instance of a "mistaken" date or event, it would be understandable. But when, as pointed out in our opening brief, known and proveable dates were disregarded, and repudiated acts were included in the indictment, we believe the problem raised is a serious one.

(2) Overt Act 2.

Overt Act 2 alleges that Ege "took one Constance Marie Bell" to "395 Monterey Boulevard" allegedly "on or about September 15".

An overt act is necessarily an active, not a passive one, to meet the requirements of law. The act complained of here is the act of *taking* Bell to the address described.

As previously indicated, there is no proof of the *taking,* but on the contrary the evidence indicates that Bell and her friends Rosalie went to that address after their afternoon meeting with Ege, of their own accord. There is nothing in the record to indicate that Ege accompanied them on the trip.

(3) Overt Act 4.

Overt Act 4 relates that in October, 1953, Ege drove an automobile from Folsom, California to San Francisco, California. In the bill of particulars, it is stated that this occurred "on or about October 15".

Counsel for the Government now contends that this refers to an occasion when Ege drove Bell from Folsom to San Francisco, an event which Bell places as occurring prior to September 15, 1953 [R. 172].

Even under liberalized pleading procedures a defendant is entitled to be given some conception of his alleged acts which are complained of. The desire of the pleader to take full advantage of the rules which make a seemingly innocuous occurrence such as driving an automobile between two cities a possible allegation as an overt act in carrying out a conspiracy, should not permit the pleader to so avoid describing the event that even though it might have occurred on a different date that there could be no doubt as to what reference had been made.

It is the constant repetition of this type of "mistake" that has lead this appellant to question the drafting of the indictment and the furnishing of the bill of particulars.

(4) Overt Act 5.

Government counsel apparently concedes the failure of proof as to this overt act. He states (Gov. Br. 40):

> "As far as overt act 5 is concerned it appears that Judy Berg rather than Constance Marie Bell actually

recorded the number of the defendant Joseph Boyd [Tr. 173]. She was told, however, by Ege to telephone Boyd [Tr. 173]. Overt act 5 was only important insofar as it involved an act by Ege calculated to bring together the prostitutes Bell and Berg with the brothel owner Boyd. There is no doubt but that his supplying the telephone number to the girls actually resulted in a meeting with Boyd and work by the girls in the Boyd house of prostitution."

We disagree with counsel's statements on several scores. The reference to the transcript on appeal which he makes refers not to this incident, but to the occasion of the telephone number in Delano [R. 173].

Actually, the variance was great and not "immaterial" as claimed by the Government (Gov. Br. 40), for it is essential to jurisdiction.

Constance Marie Bell testified as follows on this subject:

"Q. Did the defendant Ege give you any instructions or did he give any instructions to Judy in your presence regarding what was to be done when you arrived at Phoenix? A. Well, she was to phone this Joe Boyd at this motel or some place and he wasn't there, and I don't know how exactly she did get in touch with him. It was through the maid, I don't know, or Eddie left a message at the motel for her to call some other number, but I don't know how it was. [R. 73.]

* * * * * * * *

Q. Before leaving for Phoenix did Mr. Ege give you a phone number? A. No, he didn't. [R. 123.]

* * * * * * * *

The Court: Judy had the phone number to call Joe Boyd, is that right? A. Yes, sir. [R. 127.]

* * * * * * * *

Q. Did Judy have the telephone number on a slip of paper, or did she use the normal telephone directory for the purpose of determining the number? A. She had it on a piece of paper.

Q. Had you ever seen Eddie Ege give her a phone number on a piece of paper in San Francisco before you went to Phoenix? A. I don't remember. [R. 130.]

* * * * * * * *

Q. The indictment alleges that the defendant Ege in San Francisco gave you the telephone number of Mr. Boyd. Now, that is not correct is it? As I understand your testimony, he gave that telephone number to Judy? A. Yes. He didn't—I didn't say he gave it to Judy.

Q. Whom did he give it to? A. I didn't say he gave it to nobody.

Q. Did he give it to you? A. No.

Q. So that the indictment as returned by the grand jury is not correct in that regard, that he gave it to you? A. I am talking for myself. He didn't give it to me. [R. 184.]

* * *"

Subsequently, the transcript of Bell's testimony before the Grand Jury was made available to counsel [R. 193]. Thereafter, a portion of this transcript relating to the above testimony was read to the witness, as follows:

Mr. Stout (Reading):

"Q. Now, did Eddie have any discussions with Judy that you recall? How did you happen to go down with Judy? A. Well, I was, well, you might call a girl friend of Judy's. We were palling around quite a bit. She was what you would call a—she

had no—I mean, she wasn't attached to anybody in particular; she went around with Eddie a lot but I mean, she wasn't attached to him. She told him that she had heard that Phoenix was open—not heard, but that she was going to Phoenix and that she had called and it was O. K., and that—

Q. Did she say whom she had called down there? A. Well, I can't say she did, but I mean it was the same place I went to.

You know, therefore, of your own knowledge, isn't it a fact, that Judy Berg is the one who called to Phoenix? A. No, I don't know of my own knowledge, and that doesn't say I know of my own knowledge. I said I guessed; I didn't know. She had the address; I don't know how she got it; I wasn't there when she got it." [R. 272-273.]

The above evidence hardly justifies Government counsel's assertion that Ege supplied the telephone number "to the girls."

We quite agree with counsel's statement (Gov. Br. 40) that "in the course of a criminal trial it is inevitable that the evidence will at times vary from that originally expected by the government." But that is not the case here, for the government had no basis for expecting other than the evidence that was actually forthcoming from the witness. Her testimony before the Grand Jury, as it appears in the record, could not have lead the Grand Jury or the United States Attorney to a different conclusion.

Why, then, was this overt act recited in the indictment and confirmed by the bill of particulars?

(5) Overt Act 8.

This relates to the alleged telephone call from Ege in San Francisco to Constance Marie Bell in the State of Arizona. There was no evidence that Ege was in the

Northern District of California, or that the call originated there.

The government argues that this jurisdictional fact can be inferred from the evidence that Bell had left Ege in San Francisco (Gov. Br. 41). We do not concede that jurisdiction can be so established.

The government states:

> "The obvious inference presented by the evidence in the case, however, was that San Francisco was the place of the call. Bell left Ege in San Francisco [Tr. 123]. There was no evidence that he had gone anywhere else to make his telephone call. According to the evidence he was a resident of San Francisco. When not driving prostitutes across the state borders he remained there. If Ege were somewhere else than San Francisco when he made that call he could have so testified. He merely denied that the telephone call had taken place at all [Tr. 295]. The jury was free to reject his testimony." (Gov. Br. 41.)

The above might be consonant with counsel's conception of a jury argument, but hardly comports with the evidence. For example, the only occasion on which the government contends he drove a prostitute across a state line occurred in December, when it is contended that Ege drove Bell from Barstow (where she had been arrested) to Las Vegas, Nevada. To say that he was in San Francisco on all other days is contrary to the evidence, as the government places him in Folsom, Fresno, and Barstow on other occasions during the period in question. Moreover, the witness Bell testified that on her arrival in Phoenix she attempted to reach Ege in San Francisco by telephone, but was unable to do so [R. 274-275], so that if any inference is to be resorted to, it would be that Ege was not in San Francisco.

(6) Overt Act 10.

This is the charge that Ege accepted money from Bell in San Francisco.

The government states:

> ". . . The evidence established that after leaving Bruno's brothel Bell was met by Ege in Fresno and driven back to San Francisco. Bell testified that she did in fact give Ege the money secured from her work as a prostitute, but that she could not recall whether Ege took it in San Francisco or in Fresno [Tr. 186]." (Gov. Br. 41.)

The best answer to this is to look at the record. On direct examination by government counsel, Bell testified as follows:

> "Q. Oh, by the way, you testified you had about seven or eight hundred dollars, I believe, as a result of the stay in Delano. What if anything did you do with that money? A. Well, when Eddie came, he got it from me in Fresno.
>
> Q. He took it from you in Fresno? A. Uh-huh." [R. 81.]

On cross-examination, she testified as follows:

> "Q. And you testified, I believe, that in Fresno when he picked you up you gave him what remained, after you had made certain expenditures yourself, of your earnings which you had obtained in Arizona and at Delano, is that right? A. Yes.
>
> Q. And you gave them to him there at Fresno, is that right? A. Yes.
>
> Q. It is alleged in the indictment as overt act No. 10, 'that in the City and County of San Francisco in October, 1953, the defendant Edward Raymond Ege took the sum of approximately $700 from Constance Marie Bell.' As I understand your pres-

ent testimony, that actually took place in Fresno, is that right? A. Well, I can't exactly remember where. I mean, so many different places that I gave money, that I don't recollect exactly where I gave any money any more.

Q. Where did you give him the money that you say you earned in Delano and Arizona? A. It was either in—when he picked me up or in San Francisco.

Q. So it may not have been Fresno, as you testified in this courtroom? A. It most likely was, but it could have been—

Q. What is your present best recollection? A. My present best recollection is Fresno, I am sure." [R. 185-186.]

It is to be noted that up until the point where she was confronted with the fact that her testimony was contrary to the allegation of the indictment, she testified freely and positively that the transaction was in Fresno. After hearing the indictment allegation, she wavered a bit, but came back to the assertion that her best recollection was Fresno, she was sure.

A finding that this act occurred in San Francisco would be contrary to the evidence.

We have quoted at length from the record in the preceding pages to avoid the criticism leveled by the government of asking that the evidence be viewed in the light most favorable to appellants (Gov. Br. 41).

If the contentions made above are correct (and we believe them to be), then the Trial Court was without jurisdiction, since none of the alleged overt acts would have been proved as taking place in the Northern District of California during the existence of the conspiracy and in furtherance and to effect the objects thereof.

Conclusion.

By directing our attention solely to the principal arguments advanced in the government brief, we do not wish to indicate that we concede any single one of the points made in the opening brief. However, we feel that the points have been properly made, and that the government brief has not succeeded in overcoming them.

We believe that the appellant Bruno was denied a fair trial in that (a) the testimony of Goldberg was improperly admitted, and that the subsequent striking of it by the Court did not cure it, nor was it cured, as government counsel urges by the verdict of the jury (*cf.*: *Krulevich v. United States,* 336 U. S. 440, 453); (b) the Court's failure to instruct that the jury must unanimously agree upon at least one overt act committed within the district, or, in the alternative, requesting special verdicts on each of the overt acts; (c) the remarks of the Judge in the presence of the jury relative to protection of the complaining witness, and the statement of the United States Attorney that she feared retaliation; and (d) a prejudicial variance occurred as among the indictment, the bill of particulars and the proof offered. The issues as to each of these matters has been set forth in the respective briefs of the parties.

Under all of the circumstances, the ends of justice would best be served by a reversal of the judgment of conviction as to the appellant Joseph Victor Bruno. For this result, we respectfully pray this Honorable Court.

Respectfully submitted,

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